No. 20,807

United States Court of Appeals

For the Ninth Circuit

LESLY COHEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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JURISDICTION

Jurisdiction is invoked under Section 1084 of Title 18 of United States Code and Sections 1291 and 1294(1) of Title 28 of United States Code.

STATEMENT OF THE CASE

Appellant was indicted on September 11, 1963, and charged with nine counts of violation of Section 1084 of Title 18 of the United States Code for the transmission of illegal wagers and betting information over an interstate telephone. TR 6. Appellant moved to suppress under Rule 41 on the grounds that evidence was secured against him in violation of the Constitution by an examination of his mail and by the inter-

ception of his telephone calls. TR 13, 57 and 58. Appellant also moved to dismiss the indictment on the grounds of duplicity and that motion was denied by the Court on May 8, 1964. TR 37.

A Bill of Particulars and an Amended Bill of Particulars were filed by the Government on February 7, 1964, and February 27, 1964. TR 31, 34. The Government filed certain Affidavits denying tampering with the defendant's mail or tapping his telephone and counsel for the appellant filed the following Affidavit.

> "*Richard H. Foster,* being first duly sworn, deposes and says:
>
> "1. That he is one of the attorneys representing the defendant, Les Cohen, and is familiar with the files, records, facts and circumstances surrounding the case.
>
> "2. That on April 22, 1963, the firm of Lewis & Foster mailed to the defendant, Les Cohen, a letter containing confidential legal advice and this letter presumedly was intercepted by agents of the Internal Revenue Service in connection with the investigation of this defendant.
>
> "3. That in connection with his investigation of this case, your affiant interviewed numerous individuals who had been interviewed by agents of the Internal Revenue Service. The individuals interviewed were asked questions by the agents of the Internal Revenue Service concerning correspondence and telephone calls made to the defendant, Les Cohen. The content of these questions was such that in order to ask the questions, the Internal Revenue Service agents must have

been familiar with the content of the correspondence and with the content of the telephone conversations to which the questions referred.

Richard H. Foster."

On April 21, 1965, the Court denied appellant's Motion to Suppress without taking testimony on the grounds that the Government's *affidavits* indicated that no tapping was made of defendant's wire and appellant's mail was not obstructed. It is to be noted that in the Motion to Suppress it is alleged that the Government not only opened and examined first class mail of the appellant, but also delayed and obstructed the mail in violation of the statutes mentioned in the Motion. The Government admitted a "so-called mail watch" which they did not consider violated the postal statute. The Court, apparently, agreed to the conclusions established by affidavit filed by the United States Attorney and the postal authorities.

At the trial, and prior to the denial of the hearing on the Motion to Suppress, witnesses were subpoenaed by the defense, including postal employees, F.B.I. agents, and officials of the Nevada Telephone Company. Both on the Motion to Suppress Evidence and at the trial, appellant was foreclosed from inquiring into either mail tampering or wire tapping by examing these witnesses.

Appellant was an employee of the Saratoga Race Sports Book, a legal "bookie" establishment in Las Vegas, Nevada. He and the witness Schuman, upon whom the conviction ultimately rested, were social acquaintances of thirty years standing.

At the trial, the Government introduced proof which tended to show that only two bettors were involved in the nine counts of the indictment, Raymond Syufy and Adolph Schuman. Three other witnesses testified as to bets and conversations concerning betting with the defendant, but these witnesses, Hochfeld, Drossman and Stead, were introduced only as common plan, scheme or design witnesses and they testified for the most part to conversations occurring prior to the effective date of Section 1084. The witness Stead's testimony was stricken in its entirety by the Court. Appellant was acquitted by either the jury or the Court on all counts except Count 7 and Count 9. Count 7, according to the Bill of Particulars, involved both Syufy and Schuman,

> "By Adolph P. Schuman by calling on three to five times to Las Vegas, Nevada, to secure the line or odds on the San Francisco Forty-Niners football games during this period of time. By Raymond Syufy actually placing bets on one-half of the San Francisco Forty-Niners (sic) during the period in question, and by Raymond Syufy actually placing bets with the defendant on one-half (not more than seven nor less than six) of all San Francisco Forty-Niners football games played during this period of time." TR 38

Count 9 involved a bet on the Liston-Patterson heavyweight fight. The witness Syufy could not identify the appellant as the individual with whom he made wagers over the telephone. The witness Schuman at one time at least stated he could not swear as to his

location at the time he made the bet on the Liston-Patterson fight over the telephone. TR 209.

The Court upheld the conviction on a Motion for Judgment of Acquittal and for a New Trial on the basis that in the Court's opinion a "conscious disregard" by not ascertaining the place from where the bettor called was sufficient to justify conviction in spite of the lack of any evidence indicating appellant's knowledge of the location of the bettor. TR 5 Hearing of November 30, 1965. The Court then sentenced the defendant to pay a fine in the sum of $5,000.00, stating during the course of his sentencing that the appellant was not "connected with any sinister ring or syndicate or operation", that the appellant came from a good family and conducted himself within the field of gambling "in a very upright manner." Hearing of November 30, 1965. Appeal was then timely made to this Court.

STATUTES INVOLVED

Section 1084 of Title 18 of the U.S. Code provides:

§1084. *Transmission of wagering information; penalties*

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which

entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed

to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored. Added Pub.L. 87-216, §2, Sept. 13, 1961, 75 Stat. 491."

26 USC 4401 provides:

Sec. 4401 *Imposition of Tax.*

"(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of Wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons Liable for Tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable

for and shall pay the tax under this subchapter on all such wagers received by him."

26 USC 4411 provides:

Sec. 4411. *Imposition of Tax.*

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

26 USC 4412(a) provides:

Sec. 4412. *Registration.*

"(a) Requirement. Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person."

Sections 1700, 1701, 1702 and 1703 of Title 18 of the U.S. code provide as follows:

§1700. *Desertion of mails.*

"Whoever, having taken charge of any mail, voluntarily quits or deserts the same before he

has delivered it into the post office at the termination of the route, or to some known mail carrier, messenger, agent, or other employee in the Postal Service authorized to receive the same, shall be fined not more than $500 or imprisoned not more than one year, or both."

§1701. *Obstruction of mails generally*

"Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100 or imprisoned not more than six months, or both."

§1702. *Obstruction of correspondence.*

"Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

§1703. *Delay or destruction of mail or newspapers*

"(a) Whoever, being a postmaster or Postal Service employee, unlawfully detains, delays, or opens any letter, postal card, package, bag or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any

carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or secretes, or destroys any such letter, postal card, package, bag, or mail, shall be fined not more than $500 or imprisoned not more than five years, or both.

"(b) Whoever, being a postmaster or Postal Service employee, improperly detains, delays, or destroys any newspaper, or permits any other person to detain, delay, or destroy the same, or opens, or permits any other person to open, any mail or package of newspapers not directed to the office where he is employed; or

Whoever, without authority, opens, or destroys any mail or package of newspapers not directed to him, shall be fined not more than $100 or imprisoned not more than one year or both. As amended May 24, 1949, c. 139, § 37, 63 Stat. 95."

REGULATIONS INVOLVED

Regulation 44.4401-2(b) provides:

"(b) *In Business of accepting wagers.*

"A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted."

SPECIFICATIONS OF ERROR

1. The evidence was insufficient.

2. The Motion to Suppress was improperly denied without a hearing.

3. The evidence was insufficient to prove knowledge of the interstate character of the call.

4. The Court's instruction on intent was improper.

5. Failure to instruct on social wagers was improper.

6. The Court's instruction on the business of wagering was improper.

7. The Court's instruction on "ignorance of the law" was improper.

8. Appellant was deprived of a fair trial by an undue limitation on cross-examination of the witness Schuman.

9. The conviction on Count 7 was improper since this count of the indictment was duplicitous.

10. The introduction of testimony tending to show other offenses than those shown in the indictment was prejudicial.

QUESTIONS PRESENTED

1. Can a Court deny without a hearing a Motion to Suppress based upon mail tampering on the affidavits of Government officials?

2. Must there be evidence, directly or indirectly, proving knowledge of the location of the bettor to constitute a violation of 18 U.S.C. 1084?

3. May a conviction rest on the testimony of a witness who cannot swear to an essential element of the defense?

4. In a Section 1084 prosecution is it proper to give the instruction that it may be inferred that a person intends the natural and probable consequences of his acts?

5. In a Section 1084 prosecution should there be an instruction where the evidence warrants on "social wagers?"

6. Are the requirements of Section 1084 with respect to be "in the business of wagering" the same as the requirements in the wagering tax law with respect to the business of accepting wagers?

7. Was it proper to instruct on "ignorance of the law"?

8. Was cross-examination improperly limited?

9. Is Count 7 of the indictment duplicitous?

10. Is the introduction of evidence tending to show the commission of other offenses prejudicial error?

ARGUMENT

I. THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS WITHOUT A HEARING.

A. Obstructing Appellant's Mail Is Unconstitutional and Contrary to Statute.

The instant case involves probably the most important procedural issue currently within the field of the criminal law. The slow and steady encroachment of the Federal Government into the privacy of its

citizen reaches its culmination in the cynical assertion on the part of the United States Attorney's office, confirmed by the Court below, that no question can or should be raised into their interception of private, first class mail addressed to the appellant herein and the novel and strange assertion by them that a bland statement by them denying misconduct forecloses any judicial inquiry into the extent of their mail tampering or whether or not in fact, agents of the government tapped the wires of appellant.

The Post Office is the agent of the public, not of the Internal Revenue Service, *Cumford v. Thompson,* 1 Fed. 417. In the instant case persons desiring to correspond with the appellant deposited with the agents of the public and of them, that is to say the Post Office Department, mail intended not for the information of the Internal Revenue Service, but mail intended for the recipient alone. They admit this mail was examined and the results of the examination submitted to the Internal Revenue Service for the purpose of prying into the business secrets of the appellant, in brief, the Internal Revenue Service desired to gain information concerning the appellant's gambling activities, if any. No authorization for such an examination was indicated by the Government. The assertion was simply made that the Government through the Post Office Department has the unqualified right to examine and record information on mail so long as the mail is not opened.

The importance of the problems presented in this attempt by the Government to encroach into the secrecy of the mail is emphasized by the hearings of

Senator Edward V. Long, D(MO) of the judicial committee inquiring into the encroachment by this practice of the right of privacy. Senator Long has introduced a bill, S2627, to specifically prohibit the practice present here.

In the instant case an additional factor is presented as was presented in the Roy Cohen case, that is to say, mail was intercepted by the Government from appellant's attorney. We suggested that this creates additional constitutional problems, *Messiah v. US,* 377 US 201.

The Government takes the position that intercepting and examining mail is a proper practice until the mail is opened. We think it is clear under the statutes and the cases, that the contrary is true. Section 1702 of Title 18 provides in part: ". . .whoever takes a letter before it has been delivered to the person to whom it has been directed, with a design to obstruct the correspondence or pry into the business secrets of another . . ." is guilty of an offense. It is clear from this section, opening mail is not the only offense which would justify a motion such as was made here. Section 1701 provides that whoever ". . . obstructs or retards the passage of mail . . ." is guilty of an offense. Section 1703 provides an offense where the postmaster "detains or delays" mail. To be sure, opening mail is an offense but as the Court can see from the above sections, it is not the only offense involving the interception of mail.

There is some authority for the Government's contentions, *Costello v. USA,* 255 Fed. 876. However, the

Costello case is based on a petition for rehearing, not a motion to suppress as here. At any event, this authority is not binding in any circumstances since it is not a decision in this circuit.

In our opinion, previous decisions in the Supreme Court forbid even the practice the Government concedes that it engages in. As early as 1877, the Supreme Court in *Ex parte Jackson* stated "letters and sealed pages . . . are as fully guaranteed from examination and inspection . . . as they were retained by the parties forwarding them in their own domicile." *Ex parte Jackson,* 96 US 727. As the Court indicated in *Hoover v. McChesney,* 81 Fed. 472, the examination of mail is an unreasonable search and seizure, unless the Government has a search warrant.

Prior to *Costello,* the holdings of the courts were that the Post Office Department could not interfere with mail unless there was some warrant in statutory authority. In *American Schools v. McNulty,* 187 US 921, the principle was established that the postal authorities may not "exercise jurisdiction in a case not governed by statute." This case held that the use of the mail was a constitutional right (see also *Pike v. Walker,* 121 Fed. 2d 37). In the event that the mail is not used properly according to the cases, the postal authorities had only the right as authorized by statutes to tamper with the mail after an administration hearing. The only exception to this rule is the right to resort to a search warrant as indicated in *Hoover v. McChesney, supra.* See also, *Walker v. Popenoe,* 149 Fed. 2d 511. Where no authority was granted by

statute even though the practices involved are nefarious, no authority lies in the Post Office Department to tamper with the mail. *US v. Halseth,* 342 US 247.

It should be noted that there is no statutory authority which in any way indicates that the letters intercepted here were non-mailable. Sections 4005, 4006, 4007 and 4008 define the occasions where mail can be intercepted and seized. Nowhere is a bookie in any way embraced within the statutes.

In the present case there is no warrant in either statute or regulations for the examination of the appellant's mail. The postal department is not the agent of the Internal Revenue Service, it is the agent of those using the mail. If Congress desired that upon the application of the proper agency of the Government mail could be examined, they would have passed a statute to that effect. No such statute was passed. *American Schools v. McNulty, supra,* therefore applies and there is no jurisdiction in the postal department to examine appellant's mail for the purpose of obtaining evidence against him without a search warrant.

We believe that the above conclusion has been upheld by this Court in the *Heilberg v. Fixa* case (affirmed *Fixa v. Heilberg,* 33 LW 4489). There the Court indicated that freedom of speech and the right of privacy preclude the interrogation of persons receiving "communist political propaganda." Here an individual engaged in lawful business has a right to correspond with those persons he so desires, including

his attorney. There is no warrant in the statutes and in fact, it would appear to be unconstitutional to subject his correspondents to interrogation by agencies of the Government.

Persons have a right to correspond with legal gamblers in Las Vegas just as they have a right to correspond with Communists. It would appear that there should be no greater constitutional right in the one case than in the other. The Court may not approve of gamblers but they are however, citizens and they have a right to correspond so long as they conduct themselves in accordance with the law.

In the event that they do not, the normal remedy of a search warrant is available to the Government. It would appear that a search into their mail should be conducted according to normal principles of law appropriate to searches. The Post Office Department is an agent of the public, not of the Internal Revenue Service and the right of privacy involved in communicating by mail should be as extensive as that guaranteed by the Federal Communications Act with respect to the telephone. Since the decision of the Court below, the Supreme Court affirmed *Fixa v. Heilberg,* at 33 LW 4489 referred to above.

The Supreme Court declared a statute expressly giving authority for the examination of mail unconstitutional. It should be noted that here there is neither a statute or regulation expressly authorizing such a procedure. The Supreme Court stated "The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee

about it, and await a response before dispatching the mail." Here instead of an Act clothed with the authority of the Congress, the unfettered, unauthorized act of Internal Revenue employees sets post office officials astride the flow of mail to inspect, appraise and obstruct it. Instead of an invitation to write about it, the addressees and addressors are actually interviewed. The odium of association with a Communist is no less than the odium of association with legal gamblers. In the event that it is considered desirable to monitor specific classes of citizens' mail, we suggest that Congress is the only authority which has the right to make that decision if any right constitutionally exists. The breaching of the principle of the inviolability of the mail as an investigative tool is the ultimate in the slow retreat from the concept of individual liberty.

B. A Hearing Should Have Been Held.

The Government claims that no hearing need be held to determine the facts surrounding the interception of the appellant's mail and the interception of his telephone conversations. We believe that in this circuit the rules require an oral hearing and the taking of evidence. In the case of *Hoffritz v. US* (9 Cir.) 240 Fed. 2d 109, the Court held that if an issue of fact is raised an oral hearing must be held. As the Court stated in *Austin v. USA,* 297 Fed. 2d 356, "unless his allegations clearly show that even if true, he would be entitled to no relief. He would be entitled to a hearing." Here the allegations of the motion are actually based upon statutes of the United States.

In the motion we, so to speak, indicted the Government. Each allegation charges a violation of the statute of the United States mentioned in the paragraph. The Government's bland denial of misconduct serves only to raise the issue of fact and requires a hearing in this case.

Here an affidavit was filed indicating the grounds for believing the appellant's conversations and correspondence to be intercepted. Unless Government officials expressly admit eavesdropping into the telephone conversations and mail correspondence of a defendant, there can never be stronger allegations.

In Rule 41 Proceedings, a defendant has no right to take depositions. Only by an oral hearing before the Court may a defendant in this proceeding obtain compulsory process for the obtaining of witnesses. Here alone, the defendant may have the compulsory process for the obtaining of witnesses guaranteed by the Constitution which will establish the grounds for his motion. The foreclosure of judicial inquiry by a bland denial by the United States Attorney or the Government employees involved by affidavit would seem to us to be unconstitutional, as well as bad judicial procedure. A defendant should have the right to examine and cross-examine Government officials under oath, otherwise any meaningful inquiry into misconduct of Government officials resulting in the deprivation of constitutional rights would be impossible.

An inquiry going behind the affidavits filed by the Government could have established much more in the way of an examination than admitted by the Govern-

ment. An examination of mail, even without opening it, can reveal the contents thereof. Placing the mail before a strong light often will allow the contents to be read. Whereas, here the Government expressly admits mail tampering, judicial inquiry should not be foreclosed to determine under the conditions of a judicial examination how far the Government has in fact gone.

The Court will note that at the trial the defense was foreclosed from inquiring into the extent that the witnesses were secured and influenced by the Government's mail tampering. It appears clear that all or practically all of the witnesses were secured by the use of this investigating tool or by the use of wire tapping. In particular the witness Schuman, on which the conviction ultimately rests, was not the type of individual who would ordinarily be contacted by investigative agencies with respect to an employee of a legal gambling establishment in Las Vegas. The only contacts which could have identified him with appellant were the examination of his mail or the tapping of the appellant's telephone conversations.

We have not discussed in detail the principle regarding the allegation of wire tapping because the principles are clear and well established. Wire tapping was alleged and supported by affidavit. An issue of fact was raised and the hearing should have been held to determine the facts as they actually exist. It should be noted that FBI officials and officials of the telephone company of Nevada were subpoenaed by the defense to try and establish the fact of wire tapping.

Both a hearing on the motion to suppress was denied and inquiry at the trial was denied. This we submit is fundamental, reversible error.

II. THE EVIDENCE WAS INSUFFICIENT TO "PROVE THE KNOWLEDGE" REQUIRED BY THE STATUTES.

An essential element of the Government's proof in this case was to prove the knowledge of the defendant of the interstate character of the calls. None of the witnesses who testified in the case gave any testimony which directly or indirectly would establish this fact. In no case did the witnesses inform the defendant of their location after the effective date of Section 1084 of Title 18. None of the calls were of such a character that telephone officials would have given some indication that long distance was involved. All of the witnesses were frequent visitors to Las Vegas. Appellant here was an employee of a legal wagering business in Las Vegas and legitimately could handle hundreds or even thousands of telephone calls concerning the subject of betting on the telephone within the State of Nevada.

The difficulties of the prosecution establishing a valid conviction on this kind of evidence were commented on by the Court in connection with the motions made at the conclusion of the Government's case:

> "The Court: But on that same circumstance, on that exact same evidence, number one, I have to make the same implication that he was talking on the telephone, that he knew where the calls came from. You have about three things here,

three ultimates that you have got to assume, that is, by implication, reasonable implication, one upon the other, don't you?

You know, there is an old doctrine that you cannot put an inference on an inference and implications on implications. Don't we have to do that very thing. Don't we have to take two or three steps, which each one has an inference to be drawn from the others of the one original step?" TR 504.

With respect to the witness Syufy, almost every element required to be proved was conspicuous by its absence. With the exception of one football game, the San Francisco Forty-Niners versus the Cleveland Browns (Count 8), Mr. Syufy was unable to remember his location. Furthermore, he was unable to identify the defendant. In fact, his testimony, since he indicated three voices were involved, definitely establishes that it could not have been the defendant on at least some occasions. Furthermore, there was no testimony supplied by the witness from which an inference could be drawn that the defendant knew the place from which he was calling.

As the Court observed at page 476 of the transcript "Maybe when we analyze the Schuman testimony it is weaker than the Syufy testimony" and at page 451 "The only thing here is, Mr. Schuman's testimony in particular was all entangled. I mean, he was giving the odds on his memory. One place it was 99 to 1, another place it was complete. Another place it wasn't quite 99 to 1. This is speculation." The evidence establishes a very close social relationship between the par-

ties. As the Court observed, there was considerable doubt whether the bets were seriously meant at all. See pages 491 to 496 of the transcript.

There is a complete lack of any evidence here from which the jury could conclude beyond a reasonable doubt that Mr. Cohen *knew* from where Mr. Schuman was calling. Nothing in the conversations indicated the place from which the call was placed either directly or indirectly. No conversation subsequent to the bet indicated any knowledge on Mr. Cohen's part of the location of the call. The Trial Court's statement of the old rule of the impropriety of piling inference on inference simply characterizes the situation where there is a complete lack of proof as to the defendant's knowledge of the illegal character of the call. Any finding of a jury of knowledge on Mr. Cohen's part would be pure speculation.

In trying to justify a finding of guilty by the jury on a motion for a new trial, the most that the Court could find to prove the fact of knowledge of the interstate character of the call was a statement that the appellant somehow "consciously disregarded" where the call was made from. TR 5 Hearing of November 30, 1965. This, apparently was established because appellant did not inquire as to where the calls originated. We submit, under the circumstances, that there is no duty of inquiry in a case of this character. The law does not provide that an individual working in a legal gambling establishment must affirmatively establish innocence with respect to a telephone call. On the contrary, we believe the burden is still on the Govern-

ment to prove that he had, in fact, the guilty knowledge required by the statute. Even a gambler need not answer a telephone at his peril.

III. THE EVIDENCE WAS INSUFFICIENT IN MANY OTHER RESPECTS.

The evidence in this case was unsatisfactory in even other respects than the failure of "proof of knowledge." Even the location of the bettor was not established by convincing evidence. For example, Count 9 involves the Liston-Patterson fight. The witness Schuman originally denied that he bet on a heavyweight championship fight in 1962. TR 206. Then, after examining his grand jury testimony, he testified that he did bet on this fight. TR 209. On cross-examination he was asked this question:

> "Q. So, in other words, let me ask you this question again. On that fight, can you swear that you called Mr. Cohen from San Francisco, California?
>
> A. No.
>
> Q. Now, with respect to the—any times you talked to Mr. Cohen about——
>
> A. May I amplify that last answer? I can't absolutely swear to it, no. To the best of my recollection, yes. But with a man's safety at stake and an absolute swearing, no."

Later he testified that he was 99% sure that the call was made from the San Francisco area. TR 275. He was never able to recall the amount of the bet (TR 276) or exactly where he was when he made the bet (TR

277) and he never informed Mr. Cohen from where he was talking. The testimony is replete with indications of the close social relationship between the parties going back over thirty years. The witness Schuman could not swear whether or not he was in Hillsborough or in San Francisco when any of the calls were made. He also indicated that he called the defendant Lesly Cohen while in Las Vegas. TR 263.

As will be pointed out later, Count 7 is such an indefinite charge that it is close to impossible to tell from the transcript whether the calls the Government had in mind in the count were supported by the evidence or not. The only thing that is clear is that on some occasions Mr. Schuman did call Mr. Cohen from the Bay Area. That on occasion he discussed bets and that on occasion he discussed politics, but he had no clear recollection as to any particular conversation.

In addition, the entire Schuman testimony indicates the classic case of friends betting with friends on major sporting events. This is not the kind of thing which Congress sought to prohibit as will be seen later. The statute was aimed at the suppression of organized gambling activities not social betting between friends. As Attorney General Kennedy stated in his report to the Committee on the Judiciary contained in the hearings before the Committee on the Judiciary on S. 1655, June 9, et seq. 1961. Program to curb organized crime and racketeering

> "Second, the bill would in that regard help suppress *organized* gambling by prohibiting the use of wire communications for the transmission of

gambling information in interstate and foreign commerce. The word 'organized' is italicized because it should be clear that the Federal Government is not undertaking the almost impossible task of dealing with all the many forms of casual or social wagering which so often may be effected over communication facilities. It is not intended that the act should prevent a social wager between friends by telephone. This legislation can be a most effective weapon in dealing with one of the major factors of organized crime in this country without invading the privacy of the home or outraging the sensibilities of our people in matters of personal inclinations and morals."

What occurred with Mr. Schuman was not the transmission of wagering information or bets involving organized gambling, but simply the casual and social kind of wagering which takes place between social acquaintances.

In our opinion conviction should not rest on the testimony of a witness who cannot swear to an essential fact required to prove the Government's case. Quoting odds where a felony conviction is involved may be a stimulating game of chance from a gambling point of view, but a criminal prosecution resulting in a conviction is not a sporting event. A conviction based on a gambler's chance should not stand.

IV. THE COURT'S INSTRUCTION ON INTENT CONSTITUTED REVERSIBLE ERROR.

The Court's instruction on intent was as follows:

"Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, of course there can be no eye witness account of a state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. *As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one standing under like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.*"

This instruction was objected to on pages 48 and 49 of the Reporter's Transcript of October 5, 1965.

The crime of which appellant was convicted requires a specific intent, that is to say the defendant must knowingly intend to accept the transmission of wagering information or bets over an interstate telephone line. The evidence tended to show in the instant case that specific phone calls were, in fact, accepted by appellant from the Bay Area and that these tele-

phone calls had to do with bets and betting. Appellant, however, was an employee of a legal betting establishment in Las Vegas and probably could and did accept telephone calls transmitting the same kind of information from within the State of Nevada. This, of course, was standard business procedure and did not constitute any crime. The instruction given by the Court, however, would allow the jury to presume his guilty knowledge of the character of the call from the mere fact that the call was, in fact, placed and received by him. This Circuit has specifically disapproved this instruction in cases where a specific intent is involved. In *Bloch v. United States,* 9th Circuit, 221 F. 2d 786, the Court, in fact, held that the giving of such an instruction on the subject of intent was such basic error that, even in the absence of objection, it required reversal. The Court stated as follows:

> "That is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. *Morissette v. U. S.,* 342 U.S. 246, 273, 72 S.Ct. 240, 96 L.Ed. 288; *Wardlaw v. U. S.,* supra. As the Supreme Court said in the Morissette case, supra, 342 U.S. at page 275, 72 S.Ct. at page 256:
>
> > " 'We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make

> an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit.'
>
> "The conclusion sought to be supplied by presumption in the Morissette case was one of intent to steal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return."

As in the *Morissette* and *Bloch* cases the giving of the instruction under attack *here* would allow a presumption of intent from facts which have no logical relationship sufficient to compel a presumption of guilty knowledge.

In a case of this character, where the act constituting the criminal offense is mala prohibita rather than mala in se, it would appear that this instruction requires reversal. *Mann v. United States,* 319 F.2d 404. See also *United States v. Palermo,* 295 F.2d 872; *Haner v. United States,* 315 F.2d 792; *Forester v. United States,* 9th Circuit, 237 F.2d 617.

V. THE FAILURE OF THE COURT TO INSTRUCT ON "SOCIAL WAGERS" WAS ERROR.

The defense submitted two instructions on the subject of social rather than business wagers. These instructions are as follows:

"Instruction No. 11

"The Government must show beyond a reasonable doubt that the defendant accepted the wagers or transmitted betting information charged in the indictment in connection with a business of accepting wagers. Personal bets with personal friends unconnected with the gambling business are not a violation of the statute charged in the indictment." TR 50

"Instruction No. 17

"Wagers on sports events or contests, to be taxable, must be placed with a person engaged in the business of accepting such wagers. The purpose of this requirement is to exclude from tax the purely 'social' or 'friendly' type of bet. A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account." TR 51

The failure of the Court to grant these instructions was excepted to on page 49 of the hearing of October 5, 1965.

Instruction 17 is a direct quote from the case of *United States v. Simon,* 241 F.2d 308 at 310, quoting Congress' report on the wagering tax law. Attorney General Kennedy in submitting Section 1084 to Congress indicated that Section 1084 contained a like requirement:

"The statute on interstate transmission of gambling information was designed to "help suppress *organized* gambling by prohibiting the use of wire communications for the transmission of gambling information in interstate and foreign commerce.

" 'The word "organized" is italicized because it would be clear that the Federal Government is not undertaking the almost impossible task of dealing with all the many forms of casual or social wagering which so often may be effected over communication facilities. It is not intended that the act should prevent a social wager between friends by telephone.' "

Throughout the legislative history it is clearly indicated that the statute excluded a social-type bet. There was evidence from which the jury could find the Schuman transactions were social in character. The lack of such an instruction was prejudicial to the defendant.

In the instant case Adolph Schuman and appellant were friends of thirty years standing. They met often in Las Vegas. TR 244 through 248. The entire transaction with Mr. Schuman is peculiar in that no where is it indicated that any money ever changed hands as a result of the bets made by him and Mr. Cohen. The bets were made on not the casual sporting event but on the important kind of super event on which social wagers are customarily made. It is submitted that this kind of wager is not the kind of activity contemplated by Congress as a violation of Section 1084 of Title 18.

VI. THE COURT'S INSTRUCTIONS ON THE "BUSINESS OF WAGERING" WERE IMPROPER.

The Court instructed the jury that the test of whether a person was in the business of wagering was as follows:

> "The test of whether a person is in the business of accepting wagers is whether he is accepting money in a game of chance in which someone may win or lose, depending on the eventuality. In the event the government does not prove that the defendant here, either in his behalf *or the behalf of someone else,* accepted the risk of winning or losing the wager he is accused of accepting, you must find the defendant not guilty." (Emphasis added.)

This instruction was objected to on page 48 and the defense submitted Instructions No. 1, TR 52; No. 2, TR 52; No. 9, No. 11, TR 50; No. 12, TR 50; and No. 17, TR 51. All of the instructions submitted by the defense adopted the principle established by *United States v. Calamaro,* 354 U.S. 351; *United States v. Simon,* 241 F. 2d 308; and Internal Revenue Regulation Section 44.4401-2(b) that, in order for one to be in the business of accepting wagers or wagering, he must have a proprietory interest and must bear the risk of winning or losing.

Section 1084 of Title 18, the section appellant is charged with violating, requires that an individual be in the "business of wagering or betting" to be subject to its sanctions. Almost identical language is used in connection with the wagering tax statutes defining those persons who are liable for the tax. Section

4401(c) refers also to the "business of accepting vagers." A violation of the provisions of Section 4401 would subject an individual to prosecution under the elony sections of the Internal Revenue Code.

Section 4411 of the Internal Revenue Code provides or an occupational tax for one receiving wagers "on ehalf" of a person liable for the tax, and a violation f its provisions would subject an individual to prose- ution for a misdemeanor. It should be noted that the nstruction which the Court gave incorporates the anguage of the occupational tax section of the In- ernal Revenue Code, that is to say the section which ives rise to a misdemeanor.

The Court refused to give the instructions sub- nitted by the defense which incorporates the language f the regulation under the Internal Revenue Code hich determines whether or not an individual ac- epting wagers would be liable for felony prosecution. he regulation reads as follows:

> "(b) *In Business of accepting wagers.*
>
> "A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted."

Under well settled principles of statutory inter- retation it is presumed that Congress intends to egulate the same subject matter where different tatutes are involved as an integrated whole. If the ame or similar language is used in one act, it is pre-

sumed that the language should be interpreted similarly in another. It is our contention that Congress did intend to correlate the two acts, that is to say the 1951 Wagering Tax Act and the 1961 Communications Act having to do with wagering. Furthermore the legislative history shows it.

At the opening of the hearings before the United States Senate on Tuesday, October 22, 1961, before the Subcommittee on Investigations of the Committee on Government Operations, United States Senate, the Chairman, Senator John L. McClellan, stated "One important aspect in this situation is that the wagering stamp tax law has been a disappointment from the viewpoint both of collecting revenue and of getting rid of bookmakers." Mortimer M. Caplin, Commissioner of Internal Revenue, testified at length concerning the experience with the wagering tax law. He also indicated that the Internal Revenue Service did not desire the service involved "in what are essentially policing procedures distinct from revenue collections." Page 95 of hearings. The report of the Committee on Government Operations of the United States Senate Report 1310, is replete with reference to the wagering tax law and the difficulties of enforcement thereunder.

The imposition of the same requirement in the 1961 Act as in the wagering tax law that to be criminal "the defendant must be in the business of wagering" to have committed an offense would imply an approval of the regulations which were promulgated under the wagering tax law. Regulation 44.4401-2(b) imposes a requirement which is both equitable and sensible with

respect to a crime which is a felony. It defines the business of wagering in terms of two factors: one, a practice of accepting wagers, and two, the assumption of the risk of profit or loss.

In the instant case, as the Government conceded at the time of trial, there is no evidence that Lesly Cohen assumed the risk of profit or loss and the isolated transactions over a period of two years did not indicate that Mr. Cohen was in the practice of accepting interstate wagering. In fact, just the contrary is shown. The only evidence here involved is that the defendant accepted an interstate wager from an old friend. The only inference which was presented to the jury is that Mr. Cohen acted as Mr. Schuman's agent in placing a legal bet in the State of Nevada. There is simply no evidence here from which the jury could conclude that Mr. Cohen had a proprietory interest in the bet as required by the Supreme Court in the *United States v. Calamaro,* 354 U.S. 351 and the regulation. See *United States v. Simon,* 241 F. 2d 308.

It should be noted that the *Calamaro* case is referred to in the legislative hearings although not by name. Since its reasoning was not specifically disapproved, this Court should adopt its reasoning with respect to the case at bar. The *Calamaro* case indicates that, in order to be in the business of wagering, a defendant must have a proprietory interest and must be betting on his own account. The only exception is the licensing requirement that those who accept bets "on behalf" of someone else must register, but this is specified by statute. 26 USC 4412.

The language of this statute was not in the act charged violated at bar. It would follow therefore that the basic test of being in the business of wagering should be followed by this Court. There is no evidence from which it can be concluded that this defendant accepted bets for his own account. Therefore, there is insufficient evidence to support the charge. In this connection it should be noted that the violation of the wagering-licensing requirements are misdemeanors where violation of the wagering tax law constitutes a felony.

As has been indicated above, we believe that the legislative history of Section 1084 clearly indicates that Congress had in mind the wagering tax law of 1951 when it enacted the section. The test of being in the business of wagering given by the Court includes an individual who accepts a wager "on behalf of" someone else. This instruction actually incorporates Section 4412 of Title 26, United States Code, which requires a person accepting wagers "on behalf of another" to register and pay tax. The language used in Section 1084, however, does not include the language "on behalf of" but merely refers to a person in the business of wagering.

This language is for all practical purposes identical with the language of Section 4401 of Title 26, United States Code, and the regulations under that Section 44.4401-2(b) defines the business of wagering in the manner above referred to. Section 1084 is a felony. Section 4401 is a felony. It would appear logical that by not including the language "on behalf of" in Sec-

ion 1084 Congress intended the more stringent requirement for a felony conviction. The defense submitted Instructions 1, 2, 9, 12 and 17 all of which appear to us to be the correct statement of the test of being "in the business of wagering." What Congress prohibited was not the isolated transaction nor did it intend felony conviction for employees, otherwise Congress would have added the language contained in Section 4412, that is to say, the language on behalf of."

Since defining appellant's status was an essential element of the crime charged, we feel that the Court's instructions constituted reversible error and in addition as a matter of law the evidence was insufficient.

VII. THE COURT'S INSTRUCTION ON "IGNORANCE OF THE LAW" WAS IMPROPER.

The Court instructed the jury as follows:

> "It is not necessary for the prosecution to prove knowledge of the accused of the particular act or failure to act is in violation of law unless and until outweighed by evidence in the case. To the contrary, the presumption is that every person knows what the law forbids and what the law requires to be done."

This instruction was objected to at pages 48 and 49 of the Reporter's Transcript of October 5, 1965. The statute here involved was quite recently enacted by Congress at the time of the commission of the offense here involved. The business of gambling insofar as

appellant was concerned was a legal one and the crime of which he is accused is *mala prohibita* rather than *mala in se*. In the instant case, therefore, it would appear to be an essential ingredient of the Government's proof to show that the defendant acted with a bad purpose and with a conscious desire to break the law. What little evidence there was to show this knowledge was equivocal and need not have been believed by the jury. The defense, however, was precluded from arguing to the jury that the Government had failed in its burden of proof in this respect. We believe that giving this instruction in a case of this character constitutes an error. See *Edwards v. United States,* 321 F.2d 342. Affirmed on rehearing. In our opinion this Court should adopt the reasoning of the first *Edwards* opinion and hold that in these circumstances the Government is not entitled to a presumption that the defendant knew he was breaking the law but must, in fact, satisfy the jury by competent evidence that the defendant knew he was breaking the law.

VIII. THE COURT IMPROPERLY LIMITED CROSS-EXAMINATION OF THE WITNESS SCHUMAN.

The conviction of appellant ultimately rested entirely on the testimony of the witness Adolph Schuman. In connection with his examination the witness Schuman was asked whether or not he asked for immunity from prosecution in return for testifying against appellant. The witness denied that he had asked or received immunity in any form. TR 272.

Exhibit 16 of the Government contained a report f an interview of the witness Schuman by Internal Revenue Agents. In this "report of interview" the Government reported Mr. Schuman, stating as fol-ows:

> "Both Mr. Schuman and his attorney assured me that given the proper immunity any information which they might have relating to our inquiry would be given completely and truthfully." TR 278.

The witness Schuman was crucial to the Govern-ent's case. His motive for falsification or exaggera-on would have to the jury a definite effect in consid-ring his vague and ambiguous testimony. The fact at he requested immunity from prosecution was significant factor in judging his credibility. Since he ad specifically denied under oath his own statements, e defense was improperly precluded from a thorough nd complete cross examination of this witness. In the rcumstances of the cases here where the jury sus-ined the allegations of the indictment only with spect to him, this limitation on cross examination ould be reversible error.

. THE COURT ERRED IN ADMITTING OVER OBJECTION THE SO-CALLED COMMON PLAN SCHEME AND DESIGN AS EVIDENCE.

The Court allowed the introduction of evidence nding to show that the defendant had committed her offenses of a like character with the witnesses

Hochfield, Drossman and Stead in 1961. As the Cour stated in *Kraft v. United States,* 238 Fed. 2d 794,

> "Evidence of this character necessitates the tria of matter collateral to the main issue is exceed ingly prejudiced, is subject to being misused, an should be received, if at all, in a plain case."

See also

Paris v. United States, 260 Fed. 2d 529, 531.

This is the kind of evidence that the Governmen introduces at its peril. In no case did the Governmen prove any knowledge on the part of the defendan that the call was interstate in character. In each cas the calls, in part at least, were innocent because of th closeness of the conversations to the passage of Sectio 1084 on September 13, 1961. No offense was prove and, therefore, under the ordinary rules, a new tria should have been granted on this ground. As th Court stated in *Mora v. United States,* 190 Fed. 2 749,

> "It is ordinarily reversible error for the tria court to admit evidence of an offense other tha the one on trial." See *Wiley v. United States,* 25 Fed. 2d 900.

The Court instructed the jury to disregard th testimony of the witness Stead. We, however, believ that the Court cannot unring the bell on this kind o evidence. Similar offense evidence is so prejudicia that, when the jury is allowed to hear it, no amoun of cautionary instructions can cure the error. *Sang Joon Sur v. United States,* 9th Circuit 167 Fed. 2 431, *Boyd v. United States,* 142 U.S. 450, 458. Th

vidence was introduced to prove intent and to show bsence of mistake or inadvertence. However, the evience showed no more than the defendant received hone calls. Nothing was shown from which it could e determined that the defendant knew the calls were rom out of state, except in the case of the witness Drossman where the conversations in that respect ccurred before September 13, 1961, and indicate an nocent rather than a guilty intent.

THE CONVICTION ON COUNT 7 WAS IMPROPER SINCE THE COUNT IS DUPLICITOUS. ONE CHARGE CONNECTED THEREIN IS UNSUPPORTED BY THE EVIDENCE.

The charge contained in Count 7 refers, according o the Bill of Particulars, to two bettors, one Rayond Syufy and the other Adolph Schuman. Syufy as unable to identify the defendant as the individual ith whom he had telephone conversations. The evience is insufficient, therefore, to prove a violation ith respect to his testimony. However, there is no ay in which the Appellate Court can determine hether the jury's conviction rested on the testimony f Syufy or whether it rested on the testimony of dolph Schuman.

As we have previously indicated, we do not believe at the evidence was sufficient with respect to Mr. chuman either since there was no evidence from hich the jury could infer knowledge of Mr. Schuan's location at the time the call was made. Howver, assuming for the sake of argument that a conviction could rest on a jury finding with respect to

Schuman since the verdict was general, it is impos sible to determine whether or not the conviction reste on the testimony to Syufy. As stated in *Bollenbach v United States,* 326 U.S. 607,

> "the decisions are plentiful that an Appellat Court cannot affirm a conviction erroneousl secured on one theory on the speculation that con viction would have followed if the correct theor had been applied."

If a conviction could have rested on either of tw grounds, one valid and the other invalid, the Cour cannot presume that the jury rested its finding on th valid ground. *Williams v. United States,* 317 U.S. 287 *Yates v. United States,* 354 U.S. 298; *Beck v. Unite States,* 9th Circuit, 298 F.2d 622; *Wilson v. Unite States,* 250 F.2d 312; *United States v. Palermo,* 29 F.2d 872. We should observe that we moved to dismis this count on the grounds that the count was duplici tous. The verdict in this case illustrates in a concret way the danger which we previously pointed out t Judge Carter.

A motion was made to Judge Carter to dismiss thi count of the indictment on the grounds that it wa duplicitous. Duplicity in indictment generally mean the charge of two or more separate offenses in on count. *Travis v. United States,* 247 F.2d 130; *Unite States v. Lennon,* 246 F.2d 24. Here two separate tele phone conversations are involved with two separat individuals. From two to seven different calls ar probably involved, although the pleading and Bill o Particulars are both so vague as to make the exac

number of telephone calls impossible to determine. In our opinion, each telephone call would constitute a separate offense and the charging of a number in the same count makes that count duplicitous.

Ordinarily duplicity does not assume the importance that it does in the instant case. Here the danger of duplicity is clearly shown, since in the present case it is impossible to determine which witness the jury believed or to determine which offense, if any, on which they convicted the defendant. This count should, therefore, be dismissed by the Court.

CONCLUSION

The Attorney General's report submitting Section 1084 to the Congress indicates that Section 1084 was designed to inhibit organized gambling and organized crime. The evidence in this case establishes nothing of the kind, but only social wagering at isolated times with a friend of thirty years standing. In our opinion, in view of all the circumstances of the case, including the impropriety of the instructions and the denial of hearing on appellant's Motion to Suppress, the conviction should not be allowed to stand.

Dated, San Francisco, California,
July 18, 1966.

JOHN V. LEWIS,
RICHARD H. FOSTER,
Attorneys for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard H. Foster,
Attorney for Appellant.